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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

DAVID ALLEN ROEDER,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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59pp

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER PETITIONER'S WRITTEN AND ORAL CONFESSIONS, AND EVIDENCE OBTAINED THEREFROM, SHOULD HAVE BEEN SUPPRESSED BECAUSE OF VITIATION OF PETITIONER'S WAIVER OF HIS FIFTH AMENDMENT RIGHT TO HAVE COUNSEL PRESENT DURING INTERROGATION WHERE PRIOR TO OR DURING THE INTERROGATION LAW ENFORCEMENT OFFICIALS DID NOT INFORM PETITIONER THAT A COLORADO DEPUTY PUBLIC DEFENDER, PURSUANT TO HIS STATUTORY DUTIES AND RESPONSIBILITIES, SOUGHT, UNSUCCESSFULLY, TO INTERVIEW PETITIONER?

II.

WHETHER THE PETITIONER'S WRITTEN AND ORAL CONFESSIONS, AND EVIDENCE OBTAINED THEREFROM, SHOULD HAVE BEEN SUPPRESSED INSOFAR AS SAME WERE OBTAINED THROUGH EXPLOITATION OF PETITIONER'S ILLEGAL ARREST AND CONTINUING ILLEGAL DETENTION IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS?

III.

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IV.

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V.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, entered on April 3, 1985, rehearing denied on May 15, 1985.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas herein is reported at ____S.W.2d____, No. 68,887, dated April 3, 1985, and appears in the Appendix, Exhibit A.

JURISDICTIONAL GROUNDS

The Court of Criminal Appeals of Texas reversed the judgment of conviction and death sentence herein, and remanded this cause for a new trial by written opinion dated April 3, 1985, Appendix, Exhibit A. A Motion for Rehearing, Appendix, Exhibit B, was timely filed by Petitioner and the Court of Criminal Appeals of Texas denied leave to file same, with two of the nine judges dissenting without written opinion, on May 15, 1985, Appendix, Exhibit C. This petition was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution, Amendment 4:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution, Amendment 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution, Amendment 6:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution, Amendment 14, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

Texas Code of Criminal Procedure, Article 2.09:

> Each of the following officers is a magistrate within the meaning of this Code: The judges of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the District Court, the county judges, the judges of the county courts at law, judges of the county criminal courts, the justices of the peace, the mayors and recorders and the judges of the city courts of incorporated cities or towns.

Texas Code of Criminal Procedure, Article 51.13, Section 14:

> The arrest of a person may be lawfully made also by any peace officer or private person, without a warrant upon reasonable information that the ac-

cused stands charged in the courts of a State with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

Colorado Revised Statutes, Section 16-19-115:

Arrest without warrant. The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year. When so arrested the accused must be taken before a judge with all practicable speed, and complaint must be made against him under oath setting forth the ground for arrest as in section 16-19-114; and thereafter his answer shall be heard as if he had been arrested on a warrant.

Colorado Revised Statutes, Section 16-3-402:

Right to communicate with attorney and family. (1) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or by communicating in any other reasonable manner. Such communication shall be permitted at the earliest possible time after arrival at the police station, sheriff's office, jail, or other like confinement facility to which such person is first taken after arrest.

(2) If the accused is transferred to a new place of custody, his right to communicate with an attorney and a member of his family is renewed.

(3) The public defender, upon his request and with due regard for reasonable law enforcement administrative procedures, shall be permitted to communicate with any person in custody to determine whether that person has counsel and, if the person desires that the public defender represent him, to make an initial determination as to whether the person is indigent.

Colorado Revised Statutes, Section 16-3-403:

Right to consult with attorney. Any person committed, imprisoned, or arrested for any cause, whether or not such person is charged with an offense, shall be allowed to consult with an attorney-at-law of this state whom such person desires to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. Except where extradition proceedings have been completed or are not required by law, when any such person is about to be moved beyond the limits of this state, the person to be moved shall be entitled to a reasonable delay for the purpose of obtaining counsel and of availing himself of the laws of this state for the security of personal liberty.

Colorado Revised Statutes, Section 16-3-404:

Duty of officers to admit attorney. (1) All peace officers or persons having in custody any person committed, imprisoned, or arrested for any alleged cause shall forthwith admit any attorney-at-law in this state, upon the demand of the prisoner or of a friend, relative, spouse, or attorney of the prisoner, to see and consult the person so imprisoned, alone and in private, at the jail or other place of custody, if such person so imprisoned expressly consents to see or to consult with the attorney.

(2) Any peace officer or person violating the duty imposed by this section or section 16-3-403

shall forfeit and pay not less than one hundred dollars nor more than one thousand dollars to the person imprisoned or to his attorney for the benefit of the person imprisoned, to be recovered in any court of competent jurisdiction.

STATEMENT OF THE CASE

The Petitioner was tried for the offense of capital murder in Cause No. 275,540 in the 182nd District Court of Harris County, Texas, and was convicted of said offense and sentenced to death. The federal questions presented herein were presented to said Court at a pretrial hearing on a motion to suppress evidence (R. 101-638) and overruled by said Court prior to trial (R. 638), and were further presented during the course of the trial by continuing objections, though thereafter unnecessary to preserve error under Texas law, made when such evidence complained of was offered into evidence.

The case was appealed to the Court of Criminal Appeals of Texas, and the questions presented herein were raised in said Court by assignment of error as reflected in the brief filed by Petitioner, which will accompany the certified record heretofore requested herein, namely: Grounds of Error Number Ten and Eleven presented all issues regarding improper admission of Petitioner's written and oral confessions and evidence obtained therefrom; Ground of Error Number Twelve presented the issue of sufficiency of the evidence; and Ground of Error Number Thirteen presented an issue regarding admissibility of evidence obtained from a warrantless search of Petitioner's apartment. The Court sustained one of nine grounds asserting error in jury selection and remanded the case for a new trial without ruling on the nonmootable federal questions

presented. Said Court, with two of the nine judges dissenting without written opinion, thereafter refused leave to file a timely Motion for Rehearing filed by Petitioner requesting said Court to rule on the nonmootable issues presented as same would arise at a retrial. Appendix, Exhibits B and C.

The pertinent facts concerning the evidentiary issues presented herein as summarized from the hearing on the pretrial motion to suppress evidence (R. 101-638) and from the guilt phase of the trial (R. 4244-5244) include the following. On January 23, 1978, the Houston Police focused attention upon a robbery which occurred at Gina's Custom Jewelry Store wherein Georgiana Rose, the proprietor, two other persons, namely Dr. William S. Fitzpatrick and Donald C. Fantich, and all of the store's jewelry were missing. The subsequent investigation generally was related through the testimony of Captain Zoch (R. 110-156); Lt. D. V. Weer (R. 157-180); D. W. Fullbright (R. 181-216); and C. W. Kent (R. 217-242). Detective Earl Musick (R. 274-313) obtained a confession from J. C. Wilkerson regarding the robbery in question on Friday, January 27, 1978, at 9:00 p.m. which implicated Petitioner, Mark Cass, and Robert Avilla as perpetrators of the robbery and indicated the hostages were last seen by Wilkerson on Monday, January 23, 1978, at an apartment shared by Petitioner and Avilla (R. 278-281). Additional statements were taken from Janice Burns and Tommy Teusch which corroborated some of the information supplied by Wilkerson; however, none of the information indicated that anyone was dead or that any hostage was at the apartment as of January 28, 1978 (R. 282-283). Based upon the information received, Musick and other officers proceeded to Petitioner's

apartment at approximately 2:00 a.m. on Saturday, January 28, 1978, and upon arrival noticed stereo music and a light but got no response from knocking. The apartment mailboxes were then checked and the officers were led to Petitioner's sister, Diane Roeder, who informed them that Petitioner and Mark Cass had gone to Colorado and that she had talked to Robert Avilla on the phone shortly before their arrival, and the officers concluded Avilla was still in the apartment in question. Musick thereupon called Assistant District Attorney Don Stricklin, who advised at that late hour it would take quite some time to secure a warrant, and Musick, in part because of his concern for the safety of the hostages and based upon his conversation with Stricklin, decided to go ahead and enter the apartment without a warrant. (R. 284-288). The apartment manager gave the officers a key to Petitioner's apartment and same was entered. After Musick determined that nobody was inside the apartment, Lt. Fullbright called for a police chemist and others to assist with a full search of the apartment. Robert Avilla drove up in the interim and was arrested at 3:00 a.m., and later gave a confession which implicated Petitioner and stated that the victims were dead and buried at the Roeder family farm in Shiner, Texas. As a result of the full search of the apartment, the officers, especially Robert Warkentin (R. 4661-4700), a police chemist who participated in the search, recovered evidence, including adhesive tape, a spent cartridge case, boots, a gold chain, ammunition, rolls of tape, a gold ring, and a baggie with plant substance. Photographs were taken of the apartment as well. Musick also found a vehicle registration and license number, and felt that they had probable cause to issue a "pickup" for Petitioner, Cass, and the vehicle (R. 294-295). On January 28, 1978, Robert Avilla accompanied

the officers to the Roeder farm in Shiner, Texas, and that afternoon pointed out a location where the bodies of the victims were found (R. 296-297).

Based upon the foregoing, Lt. D. W. Fullbright (R. 181-216) ordered a "pickup" as to Petitioner, Mark Cass, and the suspected vehicle (R. 203-206). As a result, a radiogram was dispatched from the Houston Police Department to several states with emphasis on Grand Junction, Colorado, at 8:50 a.m. on January 28, 1978, which stated in pertinent part that Petitioner and Cass were *"wanted but not charged for capital murder"* in Houston. (R. 243-245; R. 6452-6453). Appendix, Exhibit D. Houston Police Lieutenant A. E. Tharling (R. 246-273) testified, in essence, that at approximately 2:45 p.m. on January 28, 1978, he received a phone call from the dispatcher in Grand Junction, Colorado, advising that the vehicle in question and two suspects fitting the description of Petitioner and Cass had been spotted at a hamburger stand. Tharling advised that they were to go ahead and arrest Petitioner and Cass, and that he would try to file charges and get them a warrant as soon as possible. Tharling had a phone conversation with Captain Hicks in Grand Junction at approximately 3:30 p.m., was informed of the arrest, and was told by Hicks that a warrant was needed. Tharling advised Hicks that based upon a conversation with an assistant district attorney he would prefer to wait a few hours before filing charges. Capital murder charges were filed at approximately 9:30 p.m. on January 28, 1978, some six hours after the arrest, according to Tharling. (R. 252-259; R. 269-271). Captain Joe Hicks (R. 4853-4879) of the Mesa County Sheriff's Department in Grand Junction, Colorado, directed the arrest of Petitioner and Cass, and testified that the only informa-

tion in his possession at the time of the arrest was the radiogram from Houston which had been received earlier on the morning of January 28, 1978 (R. 4871). Another radiogram was sent to Hicks by Detective Porter of the Houston Police Department after charges had been filed advising, in essence, that Petitioner had been charged with capital murder in the 182nd District Court in Cause Numbers, 275,540, the instant case (R. 6), Appendix, Exhibit F; 275,541, Appendix, Exhibit G; and 275,539, Appendix, Exhibit H, and requesting they "hold all jewelry, clothing and personal belongings and the vehicle subjects arrested in." (R. 243-245; R. 6542-6543). Appendix, Exhibit E.

After Petitioner's arrest, Captain Hicks left orders with Mesa County Colorado Jail personnel that absolutely nobody was to see Petitioner and Cass unless they specifically requested to see an attorney. (R. 4973-4979). On January 29, 1978, at approximately 12:00-12:30 p.m. Colorado Deputy Public Defender Edward Lipton (R. 507-579) sought to interview Petitioner and Cass, and was refused permission to do so by jail personnel based upon Captain Hicks' orders. Lipton stated that Colorado law imposes a duty on the Public Defender to determine indigency, whether the Public Defender will represent the accused, and whether the accused has been taken before a magistrate without unnecessary delay. Lipton thereafter spent the next several hours seeking judicial relief in connection with phone calls between Hicks, District Judge William Ela, and Mesa County District Attorney Clarence Farine, and was finally advised by Judge Ela that he could not interview Petitioner based upon representations made to Judge Ela by Farine that Petitioner had approximately $400.00 in his possession which could be

used to hire a lawyer. Lipton had advised Judge Ela that $400.00 would not be enough to hire a lawyer in extradition matters and that he had been told the money was being held as evidence. In this regard, Petitioner's father, Bernard Roeder (R. 587-590), testified that he later attempted to recover the money and was told by Captain Zoch that it was being held as evidence. Lipton, upon the advice of the State Public Defender in Denver, unsuccessfully attempted to contact the Chief Justice of the Colorado Supreme Court. Lipton stated that in the previous five years he had never been denied access to a prisoner. (R. 507-544). Petitioner was never advised that the Deputy Public Defender had sought to interview him.

On January 29, 1978, Don Stricklin (R. 458-506), an Assistant District Attorney for Harris County, Texas, and Detective Walter Burkham (R. 377-458) arrived in Grand Junction, Colorado. Interrogation of Petitioner began at approximately 8:10 p.m., with Captain Hicks and Deputy Lawrence Mike Smith (R. 314-376) present but not participating, and culminated at 5:00 a.m. on January 30, 1978, when the Petitioner signed his written confession (R. 6387. Admitted R. 4982). All of the law enforcement officials testified that Petitioner was read his Miranda warnings, and that Petitioner at no time requested to see a lawyer. In this regard, Petitioner (R. 601-627) testified that he requested a lawyer on numerous occasions, but was told he could talk to a lawyer at a later time. After Petitioner signed his written confession, Detective Burkham obtained a signed consent to search form with respect to Petitioner's automobile (R. 377-390), and searched same, recovering various items of evidence including a pistol, paper, duct tape, and bullets (R. 411-413). Deputy Smith stated Petitioner was later

taken before the County Judge where he waived extradition (R. 351). No evidence was offered to show what occurred at this proceeding other than the fact was reflected on a jail log. Detective Burkham testified that on Tuesday, January 31, 1978, Petitioner and Cass were transported back to Houston by private jet, arriving at 6:40 a.m., and that they were met at the airport by Detective Musick. After breakfast they proceeded directly from the airport to Shiner, Texas, following the same route related by Petitioner and Cass, who on the way pointed out a lake where a weapon had been thrown (R. 439-441). Detective Musick testified that while at the farm in Shiner, Texas, at the direction of Petitioner and Cass, a shotgun in a plastic bag wrapped in duct tape similar to that found on the bodies, a semiautomatic weapon, a black briefcase containing jewelry, and a plastic bag containing jewelry were recovered (R. 299-313).

No evidence was produced in the instant case to show that a judge or magistrate ever made a determination that probable cause existed for the arrest of Petitioner or for his continued detention up to February 1, 1978, the day after Petitioner was returned to Texas, when Petitioner was indicted (R. 7) for the offense herein.

REASONS FOR GRANTING THE WRIT

I.

WHETHER PETITIONER'S WRITTEN AND ORAL CONFESSIONS, AND EVIDENCE OBTAINED THEREFROM, SHOULD HAVE BEEN SUPPRESSED BECAUSE OF VITIATION OF PETITIONER'S WAIVER OF HIS FIFTH AMENDMENT RIGHT TO HAVE COUNSEL PRESENT DURING INTERROGATION WHERE PRIOR TO OR DURING INTERROGATION LAW ENFORCEMENT OFFICIALS DID NOT INFORM PETITIONER THAT A COLORADO DEPUTY PUBLIC DEFENDER, PURSUANT TO HIS STATUTORY DUTIES AND RESPONSIBILITIES, SOUGHT, UNSUCCESSFULLY, TO INTERVIEW PETITIONER?

The question presented is substantially identical to that now under consideration by this Honorable Court in the case of *Moran v. Burbine,* Cause No. 84-1485. The facts as heretofore discussed are more aggravated than those considered in *Burbine v. Moran,* 753 F.2d 178 (First Cir. 1985). In the instant case, the Deputy Public Defender had a statutory right and duty to interview any prisoner to make an initial determination of indigency, to determine whether the Public Defender's Office will represent the prisoner, and to determine if the prisoner had been taken before a magistrate without unnecessary delay. Colorado Revised Statutes, § 16-3-402 and § 16-3-403. Colorado law imposes penalties for denying attorneys and such officials access to prisoners. Colorado Revised Statutes, § 16-3-404. Moreover, the Deputy Public Defender upon being denied access to Petitioner actively sought judicial intervention and same was denied. Petitioner was

never told that the Deputy Public Defender had appeared and attempted to interview him prior to or during the interrogation which prompted his confessions.

While never ruled upon by this Honorable Court, many other courts, including most recently the Court of Criminal Appeals of Texas, have held that failure to inform a suspect in custody that an attorney sought an interview vitiates subsequent waiver of the Fifth Amendment right to have counsel present at interrogation. See for example: *Burbine v. Moran, supra,* and cases cited therein; *Dunn v. State,* ____S.W.2d____ (Tex. Cr. App.), No. 248-84, delivered June 26, 1985; *Lodowski v. State,* ____A.2d ____, 37 Cr.L. 2144 (Md. 1985); *State v. Matthews,* 408 So.2d 1274 (La. 1982); *People v. Rogers,* 397 N.E. 2d 709 (N.Y. 1979); *State v. Hill,* 178 S.E.2d 464 (N.C. 1971); *State v. Johns,* 177 N.W.2d 580 (Neb. 1970); and *Commonwealth v. McKenna,* 244 N.E.2d 560 (Mass. 1969). Law enforcement agents have no constitutionally valid reason for preventing an accused from consulting counsel, and a knowing and intelligent waiver of the right to have counsel present during interrogation will not result if the accused is not told of counsel's presence to the extent that an informed decision can be made. The following observation by this Honorable Court with regard to the Sixth Amendment right to counsel in *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed.2d 977, 84 S. Ct. 1758 (1964) at 12 L.Ed.2d 985, 986 seems especially pertinent to the issue herein:

> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system

> worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, there is something very wrong with that system."

The only inferrable reason in the instant case for refusing to allow Colorado Deputy Public Defender Lipton to see Petitioner is that the law enforcement agents herein feared Petitioner might fully learn of his constitutional rights and thereafter exercise same. Such a chilling effect on the free, knowing, and intelligent exercise of rights guaranteed by the Fifth and Fourteenth Amendments should not be permitted by this Honorable Court.

II.

WHETHER THE PETITIONER'S WRITTEN AND ORAL CONFESSIONS, AND EVIDENCE OBTAINED THEREFROM, SHOULD HAVE BEEN SUPPRESSED INSOFAR AS SAME WERE OBTAINED THROUGH EXPLOITATION OF PETITIONER'S ILLEGAL ARREST AND CONTINUING ILLEGAL DETENTION IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS?

In the instant case, the State of Texas clearly failed to meet its burden to show that the Petitioner's warrantless arrest was legal. Quite the contrary, the evidence adduced both at the suppression hearing and the trial indicate that the Petitioner's arrest and detention were clearly illegal for several reasons which will be discussed hereinafter.

The warrantless arrest of the Petitioner is governed by the provisions of the Uniform Extradition Act which has

been enacted both in Texas and in the State of Colorado. Texas Code of Criminal Procedure, Art. 51.13, Sec. 14, and Colorado Revised Statutes § 16-19-115. As to a warrantless arrest under either state's statute, the Uniform Extradition Act requires *"reasonable information that the accused stands charged in the courts of a State."* Quite obviously the Uniform Extradition Act by requiring reasonable information that the accused stands charged in the courts of a state implicitly contemplates that a magistrate in the demanding state has by accepting charges already made a judicial determination that probable cause for the accused's arrest exists. In the instant case, the Colorado officers were specifically advised initially by radiogram or telegram and then by telephone that no charges had been filed in Texas prior to Petitioner's arrest.

The Petitioner's warrantless arrest in the instant case is illegal and invalid for yet another reason in that the arresting officers violated the express terms of the Uniform Extradition Act as to the warrantless arrest both under Texas and Colorado law in that they failed to take the Petitioner before a judge or magistrate *"with all practicable speed"* and make complaint against him under oath setting forth the ground for his arrest. No claim of unavailability of a magistrate can be sustained as the evidence in the instant case, when viewed as a whole, clearly indicates that a State of Colorado District Judge was available and spent a great part of the afternoon on Sunday, January 29, 1978, prior to the Petitioner's confession, deciding to ultimately deny the Deputy Public Defender access to Petitioner. Failure to take an accused before a magistrate *"with all practicable speed"* has been held to render a warrantless arrest under the Uniform Extradition Act to be void from the outset. See: *Barnett v. United States,* 384 F.2d 848 (Fifth Cir. 1967); *Great*

American Indemnity Co. v. Beverly, 150 F.S. 134 (U.S. D.C. Georgia 1956). See and compare: *Cadle v. Cauthron,* 584 S.W.2d 6 (Ark. 1979); *Application of Dunster,* 328 A.2d 258 (N.J. 1974); *Williams v. Commonwealth,* 128 S.E. 572 (Va. 1925); and *Commonwealth ex rel. Cohick v. Keeper of County Prison,* 85 Pa. Dist. and Co. 394, 3 Lycoming 256.

It should be noted that while the record reflects that capital murder charges were filed against the Petitioner after his arrest in Colorado, the complaints filed against Petitioner at approximately 9:00 p.m. on January 28, 1978, were sworn to by Officers Porter and Burkham before Harris County Assistant District Attorney Jack Frels. (R. 6), Appendix, Exhibits F, G, and H. The word *magistrate* in the context of extradition has reference to any person regarded as a magistrate under the law of the state where the crime is committed. *Compton v. Alabama,* 214 U.S. 1, 53 L.Ed. 885, 29 S. Ct. 605 (1908). An assistant district attorney for Harris County, Texas is not a magistrate, and in the instant case the Harris County District Attorney's Office was actively engaged in the police investigation from the outset and an assistant district attorney could not under the instant circumstances be viewed as neutral or detached. Texas Code of Criminal Procedure, Art. 2.09; *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed.2d 564, 91 S. Ct. 2022 (1971); *Mancusi v. DeForte,* 392 U.S. 364, 20 L.Ed.2d 1154, 88 S. Ct. 2120 (1968); *Albrecht v. United States,* 273 U.S. 1, 71 L.Ed. 505, 47 S. Ct. 250 (1927). Moreover, the post-arrest complaints filed in the instant case would not have supported valid extradition of the Petitioner from Colorado, and would not have supported a legal arrest pursuant to a warrant or continued detention of Petitioner under any circumstances because the affidavits

made on information and belief set forth no facts to show the existence of probable cause for Petitioner's arrest. In *Whitely v. Warden*, 401 U.S. 560, 28 L.Ed.2d 306, 91 S. Ct. 1031 (1971), which is in this regard indistinguishable from the instant case, it was stated at 28 L.Ed.2d 313:

> "We do not, of course, question, that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officers to rely on fellow officers to make the arrest.
>
> "In sum, the complaint on which the warrant issued here clearly could not support a finding of probable cause by the issuing magistrate. The arresting officer was not himself possessed of any factual data tending to corroborate the informer's tip that Dailey and Whiteley committed the crime. Therefore, Petitioner's arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial."

In the instant case, no valid arrest warrant was ever obtained, and there was virtually no showing of any facts to excuse failure of the Houston police assisted from the outset by the Harris County District Attorney's Office in the investigation to obtain an independent judicial assessment of probable cause for Petitioner's arrest or continued detention. Petitioner was never in lawful custody

until February 1, 1978, when he was indicted for capital murder in the instant case. (R. 7).

The trial court's findings of fact on the issue of the voluntary nature of the confession (R. 6455-6460), while finding the statement voluntary, wholly failed to address the issue of the legality of the Petitioner's arrest or detention and the consequences thereof. Even though the statement may have been "voluntary" for the purpose of the Fifth Amendment, which is elsewhere challenged herein, this answers only a threshold question insofar as the proof in the instant case clearly shows an illegal arrest and continuing illegal detention and therefore a violation of Petitioner's rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution. *Payton v. New York,* 445 U.S. 573, 63 L.Ed.2d 639, 100 S. Ct. 1371 (1980). Were the issue merely that the Petitioner's arrest was illegal for any of the reasons heretofore discussed, the burden normally would fall upon the State of Texas to prove that there were intervening events which broke the causal connection between the illegal arrest and confession to the degree that the confession became sufficiently an act of free will to purge the primary taint arising from the illegal arrest. *Taylor v. Alabama,* 457 U.S. 687, 73 L.Ed.2d 314, 102 S.Ct. 2664 (1982); *Dunaway v. New York,* 442 U.S. 200, 60 L.Ed. 2d 824, 99 S. Ct. 2248 (1979); *Brown v. Illinois,* 422 U.S. 590, 45 L.Ed.2d 416, 95 S. Ct. 2254 (1975). However, since Petitioner was never in lawful custody at any time during the period within which he gave his written and oral confessions, both in Colorado and in Texas, proof of intervening circumstances, which was not shown, would not alter the fact that Petitioner's confessions were obtained through continuing illegal detention. *Florida v. Royer,* 460 U.S. 491, 75 L.Ed.2d 229, 103 S. Ct. 1319

(1983). The only events which occurred during the time interval in question must be viewed as aggravating circumstances with respect to the legality of Petitioner's arrest and detention, and Petitioner's confessions were obtained through the actual exploitation of his illegal arrest and continuing illegal detention by law enforcement officers. It is therefore submitted that the confessions, both written and oral, as well as all evidence obtained therefrom, including the evidence obtained from the search of the Petitioner's vehicle in Colorado, should have been suppressed insofar as same were illegally obtained. *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed.2d 441, 83 S. Ct. 407 (1963).

III.

WHETHER EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS SEARCH OF PETITIONER'S APARTMENT SHOULD HAVE BEEN SUPPRESSED AS OBTAINED IN VIOLATION OF THE GENERAL WARRANT REQUIREMENT OF THE FOURTH AND FOURTEENTH AMENDMENTS?

The search of the Petitioner's apartment was without a warrant, and presumptively unreasonable. *Welsh v. Wisconsin,* ____U.S.____, 80 L.Ed.2d 732, 104 S. Ct. 209 (1984). The State of Texas sought to rely on the emergency doctrine to justify the warrantless entrance into Petitioner's apartment on the theory that perhaps the victims were there. The burden of proof is upon the State to show the existence of an exception to the general warrant requirement of the Fourth Amendment based upon the emergency doctrine. *Michigan v. Tyler,* 436 U.S. 499, 56 L.Ed.2d 486, 98 S. Ct. 1942 (1978); and *McDonald v. United States,* 335 U.S. 451, 93 L.Ed. 153,

69 S. Ct. 191 (1948). In the instant case the only information known to the officers at the time of the search on January 28, 1978, was that the Petitioner's apartment was the last place the victims had been seen alive on January 23, 1978, five days before. The State of Texas proved only speculation on the part of police officers that the victims were in the apartment at the time of the search. There was no showing that a search warrant could not have been obtained, but only that it might take time to do so. It is therefore submitted that the evidence seized, including silver duct tape, a gold chain, ammunition, and vehicle registration papers, should have been suppressed. Furthermore, even if the search had been justified on the basis of the emergency doctrine, same would still be unconstitutionally overbroad under any reasonable interpretation of that exception to the warrant requirement. See: *Chimel v. California,* 395 U.S. 752, 23 L.Ed.2d 685, 89 S. Ct. 2034 (1969) and *Von Cleef v. New Jersey,* 395 U.S. 814, 23 L.Ed.2d 728, 89 S. Ct. 2051 (1969).

IV.

DOES THE PROHIBITION AGAINST DOUBLE JEOPARDY AS APPLICABLE THROUGH THE FIFTH AND FOURTEENTH AMENDMENTS AND DUE PROCESS OF LAW REQUIRE AN APPELLATE COURT TO DISREGARD INADMISSIBLE EVIDENCE IN MAKING A DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN A CRIMINAL CONVICTION?

The exact question presented was recognized but not decided upon in *Greene v. Massey,* 437 U.S. 19, 57 L.Ed.2d 15, 98 S. Ct. 2151 (1978), and has not been

determined by this Honorable Court. In the instant case, the Petitioner submitted to the Court of Criminal Appeals of Texas that excluding his illegally obtained confessions and evidence obtained therefrom as well as other inadmissible evidence obtained from the illegal warrantless search of his residence and automobile, the evidence was insufficient to support his conviction. In this regard, the Petitioner's illegal arrest and detention, resulting confessions, and evidence obtained therefrom constituted the only evidence offered by the State of Texas to establish Petitioner as one of the perpetrators of the crime involved in the instant case. Petitioner's insufficient evidence claim in this context was rejected by the Court of Criminal Appeals of Texas primarily on the notion that improper admission of evidence constitutes merely "trial error" and that such inadmissible evidence will specifically be considered by that Court and all lower Texas courts in determining the sufficiency of the evidence, as said Court has held in numerous cases, including the following: *Bain v. State,* 677 S.W.2d 51 (Tex. Cr. App. 1984); *Porrier v. State,* 662 S.W.2d 602 (Tex. Cr. App. 1984); *Adams v. State,* 639 S.W.2d 942 (Tex. Cr. App. 1982); *Fearance v. State,* 620 S.W.2d 577 (Tex. Cr. App. 1981); and *Collins v. State,* 602 S.W.2d 537 (Tex. Cr. App. 1980). In cases such as Petitioner's, the sufficiency of the evidence will not be considered at all on the premise that an appellant cannot "bootstrap himself into an acquittal" by claiming that evidence was improperly admitted and then must be discounted in determining evidentiary sufficiency. The theory of the Court of Criminal Appeals of Texas for determination of evidentiary sufficiency is perhaps best revealed in the following quotation from *Collins v. State, supra,* at 602 S.W.2d 539, 540:

> "*In pursuing such a fanciful endeavor we do an injustice to the State, for necessarily it must be assumed what could well be absolutely contrary to the case: that the prosecuting attorney mustered, assembled and laid before the jury all evidence known and available to him.* We torture the rights of appellant as well, for he is entitled to have his fate decided by a jury upon *competent evidence* under proper instructions from the trial court. *For this Court to award appellant the acquittal he desires on 'insufficient' evidence without assurance that the State has exhausted its resources—and this record surely does not provide it—thwarts the quite valid public concern that the guilty be punished.* Yet, to affirm his conviction on spoiled evidence serves neither the criminal justice system nor the constant effort to inform its participants of error that must be corrected." [Majority Opinion. Emphasis supplied.]
>
> * * *
>
> "The fact that evidence was received erroneously does not mean that it was not received, and we cannot pretend it was not received when we consider the sufficiency of the evidence." [Concurring Opinion.]

In other cases, such as *Porrier v. State, supra,* however, the Court of Criminal Appeals of Texas will consider the question of sufficiency of the evidence where the claim is that "all of the evidence," both properly and improperly received, is insufficient to support the conviction. Appendix, Exhibit A.

It is well established that the constitutional prohibition against double jeopardy as well as due process of law requires the entry of a judgment of acquittal where there is a judicial determination that the evidence is insufficient to sustain the conviction. *Burks v. United States,*

437 U.S. 1, 57 L.Ed.2d 1, 98 S. Ct. 2141 (1978). See also: *Hudson v. Louisiana,* 450 U.S. 40, 67 L.Ed.2d 30, 101 S. Ct. 970 (1981); *Jackson v. Virginia,* 443 U.S. 307, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979); and *Greene v. Massey, supra.* The Double Jeopardy Clause is not to be narrowly construed. *Green v. United States,* 355 U.S. 184, 2 L.Ed.2d 199, 78 S. Ct. 221 (1957). Moreover, the Double Jeopardy Clause allows the prosecution one fair opportunity to offer whatever proof it can assemble in order to obtain a conviction, while prohibiting another opportunity to supply evidence which the prosecution failed to muster at the first trial, with the exception that retrial may be had in every case where reversal resulted from "trial error" as opposed to insufficient evidence. The Court of Criminal Appeals of Texas has misinterpreted the concept of "trial error" in this context. In *Burks v. United States, supra,* this Honorable Court recognized that "trial error" implies nothing with respect to the guilt or innocence of the accused, and pointed out the following as examples of "trial error": (1) improper instructions; (2) prejudicial instructions; (3) absence of the accused during the proceedings; (4) an insufficient indictment; (5) improper receipt of hearsay evidence; (6) failure to dismiss a faulty indictment; and (7) incorrect receipt or rejection of evidence. Obviously, improper rulings concerning the admissibility of evidence may bear directly on the question of guilt or innocence in many, if not most, circumstances. "Trial error," as used in connection with the prohibition against double jeopardy, fundamentally addresses error of a procedural nature as opposed to that of a substantive or evidentiary nature, as recognized by Justice White in his Dissenting Opinion in *Tibbs v. Florida,* 457 U.S. 31, 72 L.Ed.2d 652, 102 S. Ct. 2211 (1982). Improper receipt of evidence where the overall

evidence is otherwise sufficient may amount to reversible error or may be harmless error, and therefore truly be "trial error"; however, where the totality of the evidence presented, as in the instant case, shows that the only evidence to link the accused to the commission of the offense is inadmissible, the same evidence would be inadmissible upon retrial and successful retrial would require the prosecution to produce additional evidence not offered at the first trial. Viewing the initial improper admission of evidence as "trial error" and thereafter considering such inadmissible evidence in determining the sufficiency of the evidence, as demonstrated by the Court of Criminal Appeals of Texas, begs the question because overlooked is the fact that improperly admitted evidence should have never been admitted into evidence, and its use by an appellate court to find the evidence sufficient, irrespective of the improper allowance of the use of same by the fact-finder at trial, exemplifies fundamental unfairness in the use of evidence which is forbidden by the Due Process Clause. *Blackburn v. Alabama,* 361 U.S. 199, 4 L.Ed.2d 242, 80 S. Ct. 274 (1960); *Lisenba v. California,* 314 U.S. 219, 86 L.Ed. 166, 62 S. Ct. 280 (1941). Such an approach creates *"a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision"* by the trial court. *Burks v. United States, supra,* at 57 L.Ed.2d 9. Had all inadmissible evidence in the instant case been properly excluded, Petitioner would have been entitled to a judgment of acquittal, whether by the trial court or on appeal. Additionally, a correct ruling by the trial court would put the prosecution on notice that its proof may be deficient so as to guarantee that the prosecution had its one fair chance to obtain a conviction. Moreover, the only conceivable reason for requiring a new trial in situations

where there would be insufficient evidence to convict if all inadmissible evidence was excluded from consideration is to allow the prosecution an opportunity to produce additional evidence to convict, which is exactly what is prohibited by the Double Jeopardy Clause. *Burks v. United States, supra.* The Petitioner therefore submits that determination of sufficiency of the evidence in the context of the prohibition against double jeopardy and due process of law requires consideration of only legally competent, admissible evidence, and that if that standard had been properly applied in the instant case the Petitioner would be, and is, entitled to a judgment of acquittal.

V.

DOES DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT IN THE CONTEXT OF A CRIMINAL APPEAL WHERE JUDGMENT IS REVERSED ON ONE GROUND AND THE CASE REMANDED FOR A NEW TRIAL REQUIRE APPELLATE DETERMINATION OF ALL OTHER SUBSTANTIVE, NONMOOTABLE GROUNDS OF ERROR ADVANCED REGARDING EVIDENTIARY CONSIDERATIONS FULLY PRESENTED IN CONNECTION WITH SUCH APPEAL WHICH WOULD ARISE AGAIN IN THE EVENT OF A RETRIAL?

The refusal of the Court of Criminal Appeals of Texas to rule on the merits of the nonmootable substantive federal questions presented in the instant case is contrary to its action in identical situations presented in other indistinguishable cases. See, for example, and compare: *Fearance v. State,* 620 S.W.2d 577 (Tex. Cr. App. 1981). The Court of Criminal Appeals of Texas has by its action in the instant case adopted an inconsistent position recog-

nizing no duty other than subjective inclination to consider and decide the merits of nonmootable claims of error of constitutional dimension advanced on appeal having otherwise found an instance of nonsubstantive reversible error. This precise issue, as best as can be ascertained, has never been considered in connection with the requirements of the Due Process Clause of the Fourteenth Amendment by this Honorable Court or any other court. A duty has, however, been recognized in a few instances by other courts to review all nonmootable issues presented on appeal which could affect a retrial after having found other error, even in some instances where such "guideline issues" have not been properly raised or preserved, under the notion of either a general duty or responsibility or recognizing such action would advance efficiency in the administration of justice or promote judicial economy. See, for example: *Clemons v. United States,* 408 F.2d 1230 (D.C. Cir. 196[illegible]), certiorari denied, 394 U.S. 964, 22 L.Ed.2d 567, 89 S. Ct. 1318; *Leahy v. United States,* 272 F.2d 487 (Ninth Cir. 1960), certiorari dismissed 364 U.S. 945, 5 L.Ed.2d 459, 81 S. Ct. 465; *State v. Sibert,* 310 P.2d 388 (Utah 1957); *Ball v. Commonwealth,* 128 S.W. 176 (Kentucky 1939); and *People v. Gleitsmann,* 197 N.E. 557 (Illinois 1935). This Honorable Court has similarly considered and ruled upon nonmootable reversible error while remanding on other grounds, implicitly in the interest of promoting the efficient administration of justice. *Killian v. United States,* 368 U.S. 231, 7 L.Ed.2d 256, 82 S. Ct. 302 (1961). See and compare: *Travis v. United States,* 364 U.S. 631, 5 L.Ed.2d 340, 81 S. Ct. 358 (1961). Moreover, the Due Process Clause of the Fourteenth Amendment guarantees a *"meaningful appeal"* which presumably would require determination of all nonmootable issues accom-

panied by adequate guidelines to the trial court in the event of a retrial. See generally: *Williams v. Oklahoma City,* 395 U.S. 458, 23 L.Ed.2d 440, 89 S. Ct. 1818 (1969); *Draper v. Washington,* 372 U.S. 487, 9 L.Ed.2d 899, 83 S. Ct. 774 (1963); and *Griffin v. Illinois,* 351 U.S. 12, 100 L.Ed.2d 891, 76 S. Ct. 585 (1956). Petitioner, assuming *arguendo* that the evidence at his trial was otherwise sufficient to sustain his conviction, has the right to readjudication of his guilt or innocence free from already presented, reversible error without the necessity of being worn down financially and emotionally by the prosecution's comparably limitless resources. Conceivably, the determination of the merits of the substantive issues advanced by Petitioner in connection with his appeal to the Court of Criminal Appeals of Texas could be prolonged *ad infinitum* by successive procedural reversal and endless retrial. Neither Petitioner nor the State of Texas will benefit by continued relitigation of the same issues already fully presented, and both have clear and legitimate interest in the finality of such litigation. Moreover, assuming retrial is necessary, without a definitive final ruling on the substantive issues raised by Petitioner concerning the admissibility of evidence, neither Petitioner, his counsel, nor the prosecution is in a position to intelligently assess the case with a view toward disposition short of full trial and reappeal. While not clearly applicable, the underlying reasons behind the protection afforded by the Double Jeopardy Clause would appear equally valid in the context of the requirements of due process of law as applied to what must be considered in connection with a criminal appeal. See and compare: *Burks v. United States,* 437 U.S. 1, 57 L.Ed.2d 1, 98 S. Ct. 2141 (1978); and *Green v. United States,* 355 U.S. 184, 2 L.Ed.2d 199, 785 S. Ct. 221 (1957).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATION

I, Donald W. Rogers, Jr., hereby certify that three true and correct copies of this Petition were mailed, postage prepaid, to Hon. Jim Mattox, Attorney General of Texas, Supreme Court Building, Austin, Texas 78711, on this the _____ day of July, 1985.

DONALD W. ROGERS, JR.

APPENDIX

EXHIBIT A

NO. 68,887

DAVID ALLEN ROEDER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Harris County

OPINION

This is an appeal from a conviction for capital murder. After the jury answered the special issues in the affirmative, the trial judge sentenced appellant to death.

In his first ground of error, appellant argues that prospective juror Tammy Lynn Wilson was erroneously excused in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968) and Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L.Ed.2d 581 (1980).

The State confesses error in their appellate brief but argues that appellant did not preserve the error because defense counsel only voiced a general objection at the time that Wilson was excused:

> "Unfortunately, the State is constrained to acknowledge that the prospective juror in this ground of error was excluded under an impermissibly broad concept of 'affect', having indicated a resolve to answer the punishment issues according to the evidence even if the result would be capital punishment

and only indicating that she would take a harder look at the evidence because it was a capital case. *See, Pierson v. State,* 614 S.W.2d 102, 107 (Tex. Crim. App. 1980)." (State's brief, page 2.)

Our review of the record shows that Wilson was erroneously excused. Throughout the voir dire, Wilson stated that, although knowing the mandatory penalty of death would affect her deliberations, she could answer the special issues affirmatively if the State proved their case beyond a reasonable doubt. The trial court sustained the State's challenge for cause after the following exchange between the prosecutor and Wilson:

"Q. And when we are talking about looking at the evidence and answering the questions, because of the way you feel about it, you would have to look at the evidence harder or something. It would affect the way you looked at the evidence, would it not?

"A. Yes.

. . .

"MR. SHAVER: I would re-urge my challenge.

"THE COURT: All right, the challenge will be sustained. Thank you very much for your very fair and candid answers to the lawyers here—yes, sir?

"MR. HOUSE: We object to the Court's sustaining the challenge."

As the State freely admits, the case at bar is very similar to Pierson v. State, supra. In Pierson v. State, supra, we held that the mere fact that a prospective juror testified that he would "take a much harder look at the evidence, and look for more reasonable doubt" than he would otherwise is not sufficient reason to excuse a juror.

This Court recognized that under Adams v. Texas, supra, no prospective juror should be excluded simply because he or she stated that his or her view of the facts or law would be "affected" by the possible infliction of the death penalty.

> "Based on our own examination of the record, we have concluded that § 12.31(b) was applied in this case to exclude prospective jurors on grounds impermissible under Witherspoon and related cases. As employed here, the touchstone of the inquiry under § 12.31(b) was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond reasonable doubt. Rather, the touchstone was whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors' performance of their duties. Such a test could, and did, exclude jurors who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be 'affected.' But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find

> the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." Adams v. Texas, supra, 448 U.S. at 49. [footnotes omitted]

Clearly prospective juror Tammy Lynn Wilson was erroneously excused. See also: Hartfield v. State, 645 S.W.2d 436 (1983); Cuevas v. State, 641 S.W.2d 558 (Tex. Cr. App. 1982).

We now turn to the State's argument that appellant's general objection was not sufficient to preserve error. The State asks that we reexamine this Court's holding in Hartfield v. State, 645 S.W.2d 436 (Tex. Cr. App. 1983).

In Hartfield v. State, supra, the prospective juror was excused in violation of Adams v. Texas, supra. In its motion for rehearing, the State argued that since the defense only told the court they excepted to the exclusion of the prospective juror without specifying the grounds for that exception error was not preserved. In response to this argument the Court wrote:

> ". . . We do not agree. It must be kept in mind that the voir dire examination in question took place in June of 1977, three full years prior to the June 1980 decision in *Adams*, supra. Therefore, at the

> time Hlozek was excused, Sec. 12.31(b) was considered constitutional even to the extent that it allowed exclusion of prospective jurors on a broader ground than *Witherspoon,* supra, and consequently there was no reason for appellant's counsel to strenuously attempt to preserve his error. We find that appellant did not waive his error." Hartfield v. State, 645 S.W.2d at 441.

We decline to reexamine our holding in *Hartfield* for two reasons. First, we believe the reasoning therein to be sound and definitely applicable to the instant case in which voir dire of the jury panel began on August 14, 1978, clearly prior to the United States Supreme Court's decision in Adams v. Texas, supra. Secondly, the primary purpose of the specific objection rule is to ensure that the trial court and opposing counsel are informed of the ground of objection so that first, the trial judge can rule on the objection, and second, opposing counsel may be afforded an opportunity to remove the objection or in some way cure the alleged error. Zillender v. State, 557 S.W.2d 515 (Tex. Cr. App. 1977).

> "In accordance with these policies, a number of exceptions to the general rule that a party cannot complain on appeal to the overruling of a general objection or an imprecise specific objection have been created. 1 McCormick and Ray, Evidence, Sec. 25, p. 25 (2d ed. 1956). Thus, where the correct ground of exclusion was obvious to the judge and opposing counsel, no waiver results from a general or imprecise objection. McCormick & Ray, supra." Zillender v. State, supra, at 517.

It is clear from the record in the instant case that counsel for both the State and the defense and the trial judge knew the nature of appellant's objection. After the

State challenged Ms. Wilson for cause, defense counsel took her on voir dire in an attempt to rehabilitate her. At the conclusion of defense counsel's questioning, the following exchange occurred:

> "THE COURT: Do you have other questions, then, Mr. Shaver?
>
> "MR. SHAVER: No, Judge, it is my position that my challenge is still good, based upon her answers that it would affect her deliberations or issues of fact. I will be happy to show the Court some citations.
>
> "THE COURT: All right, do you have other questions, then Mr. House on the matter of whether or not it would affect her deliberations?
>
> "MR. HOUSE: I have one question."

Thereupon, both defense counsel and the prosecutor interposed several more questions to Ms. Wilson as to what she meant when she used the phrase "affecting her deliberations." At the conclusion of this round of questioning, the State's challenge for cause was sustained, followed by appellant's general objection. Clearly, everyone present was aware why Ms. Wilson was being challenged for cause and why appellant was objecting to the sustaining of that challenge. See also, Turner v. State, 635 S.W.2d 734 (Tex. Cr. App. 1982) (where defendant's general objection was sufficient to preserve error.) To hold now that appellant did not preserve error would be unfair to the appellant, especially in light of the permanent nature of appellant's assessed punishment. We hold that error was preserved and sustain appellant's ground of error.

Among his other grounds of error, appellant alleges that his written confession and oral confession and the evidence recovered as a result thereof were illegally obtained. We do not consider these grounds of error since we have already found reversible error. In connection therewith, however, we must address appellant's twelfth ground of error in which he argues that eliminating this illegally obtained evidence the other evidence is insufficient to support his conviction. Appellant does not maintain that all the evidence, proper and improper, is insufficient to support the conviction. See Porier v. State, 662 S.W.2d 602, 606 (Tex. Cr. App. 1984). Instead, like the appellant in Collins v. State, 602 S.W.2d 537 (Tex. Cr. App. 1980):

> ". . . appellant . . . tries to bootstrap himself into an acquittal by arguing first that a piece of evidence was admitted erroneously, and then that the erroneously admitted evidence must be discounted in considering the sufficiency of the evidence." 602 S.W.2d at 539 (Concurring opinion).

As a result, we must refuse to consider the sufficiency of the evidence under such circumstances and reverse and remand. Porier v. State, supra. See also, Adams v. State, 639 S.W.2d 942 (Tex. Cr. App. 1982), and Fearance v. State, 620 S.W.2d 577 (Tex. Cr. App. 1980).

The judgment is reversed and the cause remanded.

McCormick, Judge

(Delivered April 3, 1985)

En Banc

EXHIBIT B

NO. 68,887

COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

DAVID ALLEN ROEDER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

MOTION FOR REHEARING

DONALD W. ROGERS, JR.
Attorney for Appellant
State Bar No. 17191500
1001 Texas, Suite 1010
Houston, Texas 77002
(713) 236-1276

To The Honorable Judges Of Said Court:

COMES NOW DAVID ALLEN ROEDER, Appellant in the foregoing styled and numbered cause by and through his Court-appointed attorney of record, Donald W. Rogers, Jr., and moves this Honorable Court to grant a re-hearing in the foregoing styled and numbered cause for the following reasons:

I.

This Honorable Court properly sustained Appellant's Ground of Error Number One, wherein it was urged that prospective juror, Tammy Lynn Wilson, was improperly excused in violation of *Weatherspoon v. Illinois,* 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed. 776 (1968), and *Adams v. Texas,* 448 U.S. 38, 100 S. Ct. 2521, 65 L.Ed. 2d 581 (1980).

II.

This Honorable Court erroneously concluded that because it had found reversible error in connection with Appellant's Ground of Error Number One, it need not address any other grounds of error, stating: "Among his other grounds of error, Appellant alleges that his written confession and oral confession, and the evidence recovered as a result thereof were illegally obtained. We do not consider these grounds of error since we have already found reversible error." In his Grounds of Error Number Ten and Number Eleven, the Appellant contended that the trial court committed reversible error by admitting his written and oral confessions, respectively, and the evidence obtained thereby, for the reasons stated in the Appellant's original brief and numerous supplements thereto. There is no question that the Appellant's con-

fessions were illegally obtained and therefore inadmissible, as well as all evidence discovered as a result therefrom. The only evidence offered at the Appellant's trial to link the Appellant with the commission of the offense herein consisted of his written and oral confessions. This Court, in cases too numerous to cite, has ruled frequently aside from the initial ground causing reversal that in the event of a retrial other matters should be considered inadmissible.

III.

This Honorable Court's decision not to review the admissibility of the written and oral confessions heretofore mentioned creates an unfair situation not only for the Appellant but for the State of Texas and the trial court as well insofar as in the event of a retrial the issue of the admissibility of the Appellant's written and oral confessions would be of paramount importance insofar as same is all the State has to connect the Appellant with the commisison of the offense for which he was indicted and tried herein. In the interest of judicial economy, both at the trial court level and at the level of this Honorable Court in the event of a second appeal herein, it is respectfully suggested that this Honorable Court should rule, in addition to the contentions in Ground of Error Number One raised by the Appellant, on the admissibility of the Appellant's confessions as have been set out in connection with Grounds of Error Number Ten and Number Eleven.

WHEREFORE, PREMISES CONSIDERED, the Appellant, DAVID ALLEN ROEDER, by and through his attorney of record, Donald W. Rogers, Jr., respectfully moves this Honorable Court to grant this Motion for Rehearing and thereafter consider and make a final ruling

upon the contentions concerning the admissibility of the Appellant's written and oral confessions raised in his initial Grounds of Error Number Ten and Number Eleven for the reasons hereinbefore stated, especially with a view toward judicial economy insofar as the admissibility of the Appellant's confessions hereinbefore discussed would be a central, if not the primary, issue at a retrial insofar as same are the only evidence existent to link the Appellant with the commission of the offense made the subject of the appeal herein.

Respectfully submitted,

/s/ DONALD W. ROGERS, JR.
Donald W. Rogers, Jr.
Attorney for Appellant
State Bar No. 17191500
1001 Texas Ave., Ste. 1010
Houston, Texas 77002
(713) 236-1276

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the Office of the District Attorney, Appellate Section, Harris County, 201 Fannin Street, Houston, Texas 77002; and the State Prosecuting Attorney, P. O. Box 12405, Capitol Station, Austin, Texas 78711, by U.S. Mail on the date of filing of this document.

/s/ DONALD W. ROGERS, JR.
Donald W. Rogers, Jr.

Date: April 17, 1985

EXHIBIT C

COURT OF CRIMINAL APPEALS
State of Texas
Box 12308
Capitol Station
Austin 78711

May 15, 1985

Mr. Donald W. Rogers, Jr.
Attorney at Law
Binz Bldg., Suite 1010
1001 Texas at Main
Houston, Texas

In Re: No. 68,887 DAVID ALLEN ROEDER
vs.
STATE OF TEXAS

Dear Sir:

I have been instructed to advise that the Court has this day DENIED the Motion for Leave to File Appellant's Motion for Rehearing in the above numbered and entitled case.

Presiding Judge Onion and Judge Miller dissent to failure to grant Appellant's Motion.

Very truly yours,

THOMAS LOWE
Clerk

By /s/ BELVA MYLER, Deputy

cc: Mr. Calvin Hartmann
Assistant District Attorney
201 Fannin
Houston, Texas 77002

EXHIBIT D

RADIO GRAM
HOUSTON POLICE
KKD - 490

Time Received: Jan. 28 8:51 A.M. 1978
From: West-Homicide
Via: 13 OPR BL

Time Sent: Jan. 29 9:20 A.M. 1978
To: AG AB
Via: 11 OPR BL

Message Number:
673 TX PD HOUSTON 0851 Jan. 28, 1978

WHEN REFERRING TO THIS MESSAGE
GIVE MESSAGE NUMBER AND DATE

REGIONS G & H
SPECT ATTN TEXAS NEW MEXICO CALIF COLO
CITY OF GRAND JUNCTION COLO

WANTED BUT NOT CHARGED FOR CAPITAL MURDER CASE L47044 SUBJS INVOLVED IN TRIPLE MURDER AND SHOULD BE CONSIDERED ARMED & DANGEROUS MAY HAVE IN THEIR POSSESSION ALRGE AMOUNT OF JEWELRY AND CASH THE BELOW VEH BELONGS TO #1 ACTOR BUT SUBJ MAY HAVE ABANDONED THIS CAR BY NOW & BOUGHT ANOTHER AS SUPPOSED TO HAVE LARGE AMT OF $100 BILLS #1 ACTOR ALSO SUPPOSE TO HAVE FAMILY IN GRAND JUNCTION COLO #1 ACTOR DAVID ALLEN ROEDER WM 073057 HAS SANDY SHORT BRN HAIR NOD #2 ACTOR MARK RICHARD CASS WM 072755 NOD VEH 1966 CHEV MALIBU BLU 77 TX KGF 172 VIN/136696K189920 THIS VEH IS ENTERED ON NCIC-AUTH WEST HOMICIDE
PD HOUSUTON TX

CANCELLED BY #690

EXHIBIT E

RADIO GRAM
HOUSTON POLICE
KKD - 490

Time Received: 9:08 P.M. 1978
From: Porter-Robbery
Via: 14 OPR SC

Time Sent: CO0390000
To:
Via: 11 OPR SC

Message Number:
680 PD HOUSTON TX 2105 CST Jan. 28, 78

WHEN REFERRING TO THIS MESSAGE
GIVE MESSAGE NUMBER AND DATE

SO MESA CO, GRAND JUNCTION COLORADO
ATTN CAPT. JOE HICKS AND SGT. SILVA

IN CUSTODY UR DEPT:
THIS DEPT HOLDS WARRANT NUMBERS 275541, 275540, 275539, 3 CASES OF CAPITOL MURDER ON DAVID ALLEN ROEDER, W/M, DOB/7-30-57. ISSUED OUT OF THE 182ND DIST COURT AND NO BOND ON ANY OF THE 3 CHARGES.
ALSO IN UR CUSTODY, MARK B. CASS, W/M, DOB/7-27-55. ALSO CHARGED WITH 3 COUNTS OF CAPITAL MURDER. WARRANT NUMBERS 275536, 275537, 275538. ISSUED OUT OF THE 176TH DIST COURT AND NO BOND ON ANY OF THE CHARGES. PLS HOLD ALL JEWELRY, CLOTHING AND PERSONAL BELONGINGS AND THE VEHICLE SUBJECTS ARRESTED IN. THIS IS IN REF TO HPD CASE #L-47044

AUTH DET PORTER-ROBBERY DIV
PD HOUSTON TX

EXHIBIT F

CONTROL No.

See Also:
0903 10 07

January 28, 1978 1aa

Time Issued 11/733

HP L 47044

THE STATE OF TEXAS

v.

DAVID ALLEN ROEDER WM, 7/30/57
4600 Sherwood, #171

275540 182nd. CAUSE No. & COURT

CHARGE CAPITAL MURDER

JUSTICE COURT No. PT 39571

BAIL $ No Bond

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Before me, the undersigned Assistant District Attorney of Harris County, Texas, this day personally appeared the undersigned affiant, who upon his oath says that he has good reason to believe and does believe that in the County of Harris and State of Texas one DAVID ALLEN ROEDER hereinafter referred to as the Defendant, heretofore on or about January 23, 1978, did then and there unlawfully, intentionally and knowingly murder and kill William Fitzpatrick by shooting him with a gun, and

further said murder was committed for remuneration and the promise of remuneration, namely, jewelry, and the proceeds of the sale of jewelry taken from Gina's Custom Jewelry store at 8915 Long Point, Houston, Harris County, Texas.

COUNT TWO

And the Grand Jury further presents that in Harris County, Texas, David Allen Roeder, hereafter styled the Defendant, heretofore on or about January 23, 1978, did then and there unlawfully intentionally and knowingly murder and kill William Fitzpatrick by shooting him with a gun and further said murder was committed during the course of aggravated kidnapping, namely, the unlawful and intentional abduction of Donald Fantich, Georgina Rose and William Fitzpatrick, with the intent to facilitate the commission and flight after commission of the felony offenses of theft and aggravated robbery occurring at Gina's Custom Jewelry store, 8915 Long Point, Houston, Harris County, Texas.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Sworn to and subscribed before me 1-28-78.

K. D. PORTER

Affiant WALTER BURKHAM

/s/ JACK FRELS
Assistant District Attorney of
Harris County, Texas

EXHIBIT G

CONTROL No.

See Also:
0903 10 07

January 28, 1978 1aa

Time Issued 11/733

HP L 47044

THE STATE OF TEXAS

v.

DAVID ALLEN ROEDER, WM, 7/30/57
4600 Sherwood, #171

275541 182nd. CAUSE No. & COURT

CHARGE CAPITAL MURDER

JUSTICE COURT No. PT 39572

BAIL $ No Bond

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Before me, the undersigned Assistant District Attorney of Harris County, Texas, this day personally appeared the undersigned affiant, who upon his oath says that he has good reason to believe and does believe that in the County of Harris and State of Texas one DAVID ALLEN ROEDER, hereinafter referred to as the Defendant, heretofore on or about January 23, 1978, did then and there unlawfully intentionally and knowingly murder and kill Donald Fantich by shooting him with a gun, and further

said murder was committed for remuneration and the promise of remuneration, namely, jewelry, and the proceeds of the sale of jewelry taken from Gina's Custom Jewelry store at 8915 Long Point, Houston, Harris County, Texas.

COUNT TWO

And the Grand Jury further presents that in Harris County, Texas, David Allen Roeder, hereafter styled the Defendant, heretofore on or about January 23, 1978, did then and there unlawfully intentionally and knowingly murder and kill Donald Fantich by shooting him with a gun and further said murder was committed during the course of aggravated kidnapping, namely, the unlawful and intentional abduction of Donald Fantich, Georgina Rose and William Fitzpatrick, with the intent to facilitate the commission and flight after commission of the felony offenses of theft and aggravated robbery occurring at Gina's Custom Jewelry store, 8915 Long Point Houston, Harris County, Texas.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Sworn to and subscribed before me 1-28-78.

K. D. PORTER

Affiant WALTER BURKHAM

/s/ JACK FRELS
Assistant District Attorney of
Harris County, Texas

EXHIBIT H

CONTROL No.

See Also:
0903 10 07

January 28, 1978 1aa

Time Issued 11/733

HP L 47044

THE STATE OF TEXAS

v.

DAVID ALLEN ROEDER WM, 7/30/57
4600 Sherwood, #171

275539 182nd. CAUSE No. & COURT

CHARGE CAPITAL MURDER

JUSTICE COURT No. PT 39570

BAIL $ No Bond

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Before me, the undersigned Assistant District Attorney of Harris County, Texas, this day personally appeared the undersigned affiant, who upon his oath says that he has good reason to believe and does believe that in the County of Harris and State of Texas one DAVID ALLEN ROEDER hereinafter referred to as the Defendant, heretofore on or about January 23, 1978, did then and there unlawfully, intentionally and knowingly murder and kill Georgina M. Rose by shooting him with a gun, and

further said murder was committed for remuneration and the promise of remuneration, namely, jewelry, and the proceeds of the sale of jewelry taken from Gina's Custom Jewelry store at 8915 Long Point, Houston, Harris County, Texas.

COUNT TWO

And the Grand Jury further presents that in Harris County, Texas, David Allen Roeder, hereafter styled the Defendant, heretofore on or about January 23, 1978, did then and there unlawfully intentionally and knowingly murder and kill Georgina M. Rose by shooting him with a gun and further said murder was committed during the course of aggravated kidnapping, namely, the unlawful and intentional abduction of Donald Fantich, Georgina Rose and William Fitzpatrick, with the intent to facilitate the commission and flight after commission of the felony offenses of theft and aggravated robbery occurring at Gina's Custom Jewelry store, 8915 Long Point, Houston, Harris County, Texas.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Sworn to and subscribed before me 1/28/78.

K. D. PORTER

Affiant WALTER BURKHAM

/s/ JACK FRELS
Assistant District Attorney of
Harris County, Texas

EXHIBIT I

DONALD W. ROGERS, JR.
Attorney At Law

June 27, 1985

Thomas Lowe, Clerk
Court of Criminal Appeals
P. O. Box 12308
Capitol Station
Austin, Texas 78711

Re: Cause No. 68,887, David Allen Roeder

Dear Mr. Lowe:

My client, David Allen Roeder, intends to file a petition for a writ of certiorari with the Supreme Court requesting said Court to review the judgment in the above cause. Accordingly, a request is hereby made that you prepare and certify the following for transmission to the Clerk of the Supreme Court of the United States.

1. All trial court documents in the record, and all testimony at the pretrial suppression hearing. Volume I, Pages 1-453; Volume II, Pages 454-638.

2. All testimony at the guilt phase of the trial excluding final argument. Volume X, Pages 4244-4557; Volume XI, Pages 4558-5008; Volume XII, Pages 5009-5244.

3. All documentary evidence in the record. Volume XIV, Pages 6330-6451.

4. A copy of the opinion and judgment of the Court of Criminal Appeals; Motion for Rehearing and Motion for Leave to File same, and the Courts Order of May 15, 1985 denying same.

5. A copy of Appellant's Brief.

Please inform me of the cost involved so that I may forward same to you. Because of the length of the record and my client's financial status, I would prefer that you duplicate the record through the State Bar of Texas reproduction department. Thank you for your assistance.

Very truly yours,

/s/ DONALD W. ROGERS, JR.
Donald W. Rogers, Jr.

Certified/RRR #P 017-280-141

cc. Hon. Jim Mattox
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711

Ms. Linda Marin
State Law Library
Austin, Texas 78711

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-46

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1985

DAVID ALLEN ROEDER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

DAVID R. RICHARDS
Executive Assistant
Attorney General
for Litigation

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorney of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED[1]

I. DOES DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT IN THE CONTEXT OF A CRIMINAL APPEAL WHERE JUDGMENT IS REVERSED ON ONE GROUND AND THE CASE REMANDED FOR A NEW TRIAL REQUIRE APPELLATE DETERMINATION OF ALL OTHER SUBSTANTIVE, NONMOOTABLE GROUNDS OF ERROR ADVANCED REGARDING EVIDENTIARY CONSIDERATIONS?

II. DOES THE PROHIBITION AGAINST DOUBLE JEOPARDY AS APPLICABLE THROUGH THE FIFTH AND FOURTEENTH AMENDMENTS AND DUE PROCESS OF LAW REQUIRE AN APPELLATE COURT TO FIRST CONSIDER CLAIMS THAT CERTAIN EVIDENCE WAS IMPROPERLY ADMITTED AND THEN DISREGARD EVIDENCE WHICH IT FOUND SHOULD HAVE BEEN EXCLUDED IN MAKING A DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN A CRIMINAL CONVICTION?

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[1]As discussed at length in this brief, the merits of Petitioner's claims of involuntary confessions and illegally seized evidence are not properly before the Court.

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NO. 85-46

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1985

DAVID ALLEN ROEDER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to Petitioner's Writ of Certiorari files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas reversing the conviction delivered on April 3, 1985, and reported at ____ S.W.2d ____ (Tex. Crim. App. 1985), is attached to the petition as part of the appendix.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under

the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner has fully set out the constitutional provisions and statutes upon which he relies.

STATEMENT OF THE CASE

Petitioner was indicted in Cause No. 275540 in the 182nd District Court of Harris County, Texas, for the offense of capital murder. The indictment alleged that on or about January 23, 1978, Petitioner did:

> unlawfully while in the course of committing and attempting to commit aggravated robbery, intentionally cause the death of William Fitzpatrick hereafter styled the Complainant, by shooting the Complainant with a gun.

and also that on or about that same date Petitioner did:

> unlawfully while in the course of committing and attempting to commit aggravated kidnapping, intentionally caused the death of William Fitzpatrick hereafter styled the Complainant by shooting the Complainant with a gun.

(SF I 7).[2]

Prior to trial, a hearing was held on Petitioner's motions to suppress his oral and written confessions and evidence seized in a search of his apartment (SF I 110 *et seq.*), following which the court denied both motions (SF II 636). Petitioner entered a plea of "not guilty," but was found guilty by a jury which also answered affirmatively the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b) (1), (2) (Vernon 1981). Accordingly, the court sentenced Petitioner to death.

---

[2] "SF" refers to the statement of facts of Petitioner's trial. The following Roman numeral refers to the volume, and the Arabic number refers to the page.

On direct appeal to the Texas Court of Criminal Appeals, Petitioner raised thirteen grounds of error, nine of which challenged the exclusion of certain venire members as contrary to the teachings of *Adams v. Texas,* 448 U.S. 38 (1980). The remaining grounds contested the trial court's denial of Petitioner's motions to suppress and also asserted that, absent the challenged confessions, the evidence was insufficient to sustain the conviction. The Court of Criminal Appeals reversed and remanded for a new trial, finding merit to Petitioner's contentions regarding the exclusion of venire member Tammy Lynn Wilson. The court refused to consider Petitioner's grounds of error relating to the denial of the motions to suppress "since we already have found reversible error." *See* appendix to petition at 7a. The court also held that because Petitioner "does not maintain that all the evidence, proper and improper, is insufficient to sustain the conviction . . . we must refuse to consider the sufficiency of the evidence . . ." *Id.* Petitioner then filed a motion for leave to file motion for rehearing complaining of the court's pretermission of these claims, *see* appendix at 8a-11a, but the court denied leave to file the motion for rehearing. *See* appendix at 12a.

SUMMARY OF THE ARGUMENT

There are no special and important reasons to review this case. The grounds presented by Petitioner involve only well-settled matters of state appellate review which do not implicate any federal constitutional provisions. Because no federal question is presented, this Court should decline to review Petitioner's claims.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced

no special or important reason in this case, and none exists.

II.

WHEN A CRIMINAL CONVICTION IS REVERSED ON APPEAL, THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO APPELLATE REVIEW OF OTHER SUBSTANTIVE, NONMOOTABLE GROUNDS OF ERROR.

Petitioner complains that although the Texas Court of Criminal Appeals reversed his conviction because of a violation of *Adams v. Texas*, 448 U.S. 38 (1980), it refused to review his grounds of error challenging the trial court's denial of his motions to suppress his oral and written confessions and evidence seized in a search of his apartment. He concedes, however, that this issue "has never been considered in connection with the requirements of the Due Process Clause of the Fourteenth Amendment by this Honorable Court or any other court." (Petition at 27). There is, in short, no established constitutional right to the type of review Petitioner seeks. That the type of appellate review requested by Petitioner has occasionally been afforded to other criminal defendants does not establish the *right* to such. Appellate courts, like trial courts, enjoy wide discretion in the disposition of issues before them. Thus, in *Travis v. United States*, 364 U.S. 631 (1961), this Court held that where a conviction was reversed on one ground, it was not necessary to reach the remaining contentions advanced on appeal. That this Court took a somewhat different approach in *Killian v. United States*, 368 U.S. 231 (1961) underscores the leeway permissible in treating different appeals differently and undercuts Petitioner's assertion of unfairness in the Court of Criminal Appeal's pretermission of his confession and search and seizure claims.

Further, the obvious reason Petitioner seeks a determination of these issues is his desire to prevail on his related claim of insufficient evidence and thus avoid a retrial. As discussed in Part III, *infra*, however, Petitioner is not entitled to a determination of the sufficiency of the evidence absent evidence held to be wrongly admitted. Therefore, even should Petitioner be afforded review of these claims, and in fact prevail on the merits, he nonetheless would be subject to retrial. Thus, the

"judicial economy" rationale is not implicated, at least not in the sense that consideration of Petitioner's remaining grounds might bar expenditure of the resources necessary for a second adjudication of Petitioner's guilt or innocence. In fact, establishment of a right to the extended review sought by Petitioner could serve only to severely burden the appellate courts which would be required to undertake that review. For this reason, also, this Court should refuse to exercise its certiorari jurisdiction over this claim.

III.

THE DOUBLE JEOPARDY CLAUSE DOES NOT REQUIRE THAT APPELLATE COURTS REVIEW THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A CRIMINAL CONVICTION ABSENT IMPROPERLY ADMITTED EVIDENCE.

If, as Respondent believes, there is no requirement that Petitioner's remaining grounds of "trial error" be reviewed, it necessarily follows that he is not entitled to a determination of the sufficiency of the evidence absent any improperly admitted evidence. Even should he prevail on those grounds and succeed in gaining suppression of his confessions and other evidence, however, the Texas appellate court would not be obligated to evaluate the sufficiency of the evidence absent those items.

The Texas rule of *Collins v. State*, 602 S.W.2d 539 (Tex. Crim. App. 1980) of which Petitioner complains was followed by the Fifth Circuit in *Tapp v. Lucas*, 658 F.2d 383 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982). This Court declined review of *Tapp* even though in that case the petitioner's claim was arguably more meritorious than the issue raised herein in that the Mississippi Supreme Court, in reversing the conviction due to improperly admitted evidence, had specifically observed that "[w]ithout the wife's testimony, the record on the first trial of this case would not sustain a conviction." *Tapp v. State*, 347 So.2d 974, 977 (Miss. 1977). The circumstances of the instant case are obviously less compelling.

Finally, Petitioner misses the mark in complaining that a

retrial under such circumstances allows the prosecution to muster additional evidence to support a conviction. The policy reasons supporting retrial in such circumstances have long been recognized by this Court:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

United States v. Tateo, 377 U.S. 463, 466 (1964).

Because Petitioner's claims do not raise substantial issues of federal constitutional dimension, this Court should decline review.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney
General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

CHARLES A. PALMER
Assistant Attorney General

P.O. Box 12548, Capitol Station
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Attorney for Respondent